

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 2:24-CR-00192-1

KISHA SUTTON - 1

GOVERNMENT'S RESPONSE TO
DEFENDANT KISHA SUTTON'S MOTION IN LIMINE
TO EXCLUDE EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS PURSUANT
TO RULES 403 AND 404(b) OF THE FEDERAL RULES OF EVIDENCE

Comes now the United States of America, by Jonathan T. Storage, Assistant United States Attorney for the Southern District of West Virginia, and files its response to defendant Kisha Sutton's motion to exclude potential Rule 404(b) evidence. ECF No. 263. For the reasons stated herein, the government respectfully requests that the Court deny the motion.

I. LEGAL STANDARD

"Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Fed. R. Evid. 404(a)(1). "The Rule 404(b) inquiry . . . applies only to evidence of other acts that are 'extrinsic to the one charged.'" United States v. Basham, 561 F.3d 302, 326 (4th Cir. 2009).

"Rule 404(b) . . . protects against the introduction of extrinsic act evidence when that evidence is offered solely to

prove character." Huddleston v. United States, 485 U.S. 681, 687 (1988) (emphasis added).

"[A]cts intrinsic to the alleged crime do not fall under Rule 404(b)'s limitations on admissible evidence." United States v. Chin, 83 F.3d 83, 87-88 (4th Cir. 1996).

"Evidence of uncharged conduct is not 'other crimes' evidence subject to Rule 404 if the uncharged conduct 'arose out of the same series of transactions as the charged offense, or if [evidence of the uncharged conduct] is necessary to complete the story of the crime on trial.'" United States v. Siegel, 536 F.3d 306, 316 (4th Cir. 2008) (cleaned up); see also United States v. Cooper, 482 F.3d 658, 663 (4th Cir. 2007) (explaining that evidence of bad acts that "provide[s] context relevant to the criminal charges" is admissible without consideration of the requirements of Rule 404); see also United States v. Lipford, 203 F.3d 259, 268 (4th Cir. 2000) (evidence of other criminal acts admissible without regard to Rule 404(b) where the evidence "served to complete the story" of the charged crimes).

"[E]vidence of transactions and conduct not charged is relevant to proving the existence of and the boundaries of the conspiracy or scheme." United States v. Bajoghli, 785 F.3d 957, 963 (4th Cir. 2015). "[A]ll executions of a scheme [] need not be charged." Id. at 963 (citing United States v. Pless, 79 F.3d 1217,

1220 (D.C.Cir.1996) ("That the government chose to charge as the execution of the scheme only the three deposits in National [Bank] does not reduce the boundaries of the scheme, which the statute requires the government to prove. . . . [I]t is not necessary for the government to charge every single act of execution of the scheme in order to prove the whole scheme.")).

"[B]ecause evidence of conduct not charged in a specific execution may be relevant to the nature and scope of a scheme . . . , such evidence is intrinsic to the 'scheme' element, and Rule 404(b) therefore does not . . . regulate it as 'other bad acts' evidence." Bajoghli, 785 F.3d at 964 (citing United States v. Grimmond, 137 F.3d 823, 832 (4th Cir. 1998) ("[W]hen 'other crimes, wrongs, or acts' evidence is relevant to establishing an element of the offense, Rule 404(b) is not even implicated.")).

Even when a prior act is not intrinsic, the "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b) (2).

A district court's "discretion must be balanced by the need to give the government adequate latitude to prove its case." Bajoghli, 785 F.3d 964.

"Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue

involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." Huddleston, 485 U.S. at 685.

The government is required to give advanced notice of its intended use of Rule 404(b) evidence. Fed. R. Evid. 404(b)(3). Specifically, the government is required to "(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and (C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice." Fed. R. Evid. 404(b)(3).

"To be admissible under Rule 404(b), evidence must be '(1) relevant to an issue other than character; (2) necessary; and (3) reliable.'" Siegel, 536 F.3d at 317.

"In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." Huddleston, 485 U.S. at 689.

When "other crime" evidence is shown to establish a modus operandi, it is admissible under Rule 404(b). Siegel, 536 F.3d at 318; see also United States v. Queen, 132 F.3d 991, 997 (4th Cir. 1997) ("[T]he more similar the prior act is (in terms of physical

similarity or mental state) to the act being proved, the more relevant it becomes.”).

“Evidence sought to be admitted under Rule 404(b) must also satisfy Rule 403’s requirement.” Siegel, 536 F.3d at 319. “Under this rule, ‘damage to a defendant’s case is not a basis for excluding probative evidence,’ because ‘evidence that is highly probative invariably will be prejudicial to the defense.’” Basham, 561 F.3d at 326 (quoting Grimmond, 137 F.3d at 833).

II. DISCUSSION

The defendant’s motion should be denied because (A) the government’s proposed evidence is intrinsic to the charged bank fraud scheme and does not implicate Rule 404(b); (B) even if the Court determines that some or all of the proposed evidence constitutes extrinsic “other bad acts” evidence, the proposed evidence sufficiently meets the rule’s standards, Fourth Circuit case law, and Rule 403 considerations; and (C) the government provided sufficient notice under the rules.

A. The government’s proposed evidence is intrinsic to the bank fraud scheme; thus, Rule 404(b) does not apply.

At the outset, the government submits that it provided pre-trial Rule 404(b) notice out of an abundance of caution, as the government believes that the proposed evidence is, in fact, intrinsic to the charged conduct. The government did not want to

assume what the Court would decide at trial regarding the nature of the evidence and thus risk having its evidence (Rule 404(b) or otherwise) excluded for lack of notice.

The government notified the defendants that it intends to present evidence linking defendant Kisha Sutton to the PPP loans applied for and received in the names of Lydia Spencer, Cylena Sutton, Rahmel Meekins, William Powell, Damisha Brown, and Jasmine Spencer. The evidence includes internet protocol addresses ("IP addresses"), Verizon subscriber information, IRS Form 1040-Schedules C, PPP loan applications, DocuSign records, bank account records, CashApp account records and the like.

This evidence includes expected witness testimony from cooperating witnesses who have already pleaded guilty before the Court and have stipulated to Kisha Sutton's involvement in a wide-ranging bank fraud scheme. See United States v. Lydia Spencer, Case No. 2:23-cr-00118; United States v. William Powell, Case No. 2:24-cr-00192-5; United States v. Damisha Brown, Case No. 2:24-cr-00192-6; and United States v. Jasmine Spencer, Case No. 2:24-cr-00192-7.

The evidence will show that defendant Kisha Sutton and others conspired to perpetrate a bank fraud scheme and then executed on their devised scheme. Evidence about Lydia Spencer, William Powell, Jasmine Spencer, and Damisha Brown's fraudulent PPP loans

is intrinsic to the charged crimes here because their conduct was a part of the same scheme to defraud, with defendant Kisha Sutton in the middle of it all. The government's evidence will show that the same IP address was used to submit fraudulent PPP loans for Lydia Spencer, Jasmine Spencer, William Powell, Damisha Brown, and defendant Shamiese Wright. Moreover, as to these individuals, the government's evidence will show that the scheme to defraud was executed in identical fashion: Defendant Sutton received personal information from aiders and abettors residing in West Virginia, she created loan applications from her registered IP address in New Jersey, she filled in materially false but identical information on each loan application, and she instructed her fellow aiders and abettors on how to compensate her for the role she played in the scheme. This information is necessary to tell the complete story of the defendant's fraud scheme.

The Fourth Circuit recognizes the importance of allowing the government to present evidence of acts that were a part of the overall scheme but not specifically charged. "[E]vidence of transactions and conduct not charged is relevant to proving the existence of and the boundaries of the conspiracy or scheme." United States v. Bajoghli, 785 F.3d 957, 963 (4th Cir. 2015). "[A]ll executions of a scheme [] need not be charged." Id. at 963 (citing United States v. Pless, 79 F.3d 1217, 1220 (D.C.Cir.1996)

("That the government chose to charge as the execution of the scheme only the three deposits in National [Bank] does not reduce the boundaries of the scheme, which the statute requires the government to prove. . . . [I]t is not necessary for the government to charge every single act of execution of the scheme in order to prove the whole scheme.")).

At trial, the government must prove beyond a reasonable doubt that the defendant was involved in a scheme to defraud. United States v. Scott, 270 F.3d 30, 36 (1st Cir. 2001). ("One of the elements of bank fraud is proof of a scheme to defraud."). "[B]ecause evidence of conduct not charged in a specific execution may be relevant to the nature and scope of a scheme . . . , such evidence is intrinsic to the 'scheme' element, and Rule 404(b) therefore does not . . . regulate it as 'other bad acts' evidence." Bajoghli, 785 F.3d at 964.

The government's evidence showing that defendant Kisha Sutton applied for multiple PPP loans within essentially the same timeframe in spring 2021 and executed on the same scheme to defraud in the same manner is highly relevant and exceedingly probative to this case. In such instances, the Fourth Circuit has held that "when 'other crimes, wrongs, or acts' evidence is relevant to establishing an element of the offense, Rule 404(b) is not even

implicated." United States v. Grimmond, 137 F.3d 823, 832 (4th Cir. 1998) (emphasis added).

The government's use of cooperating witness testimony and corroborating evidence to show that defendant Kisha Sutton and defendant Shamiese Wright were a part of a wide-ranging, singular scheme to defraud is not only relevant to the case, but the evidence is also intrinsic to it - intertwined so tightly by common facts and circumstances as to render the parties involved nearly interchangeable. For example, testimony from Lydia Spencer is expected to link defendants Sutton and Wright together, as Ms. Spencer connected defendant Wright with defendant Sutton for the purpose of engaging in the bank fraud scheme. Such evidence is matter-of-factly intrinsic.

The Court should conclude that the evidence the government noticed as Rule 404(b), which was noticed as a precautionary measure, is truly intrinsic to the scheme to defraud at the center of this case. The defendant's motion should be denied.

B. The government's proposed evidence satisfies Rule 404(b) because it is relevant to an issue other than character, necessary to the government's case, and reliable.

"To be admissible under Rule 404(b), evidence must be '(1) relevant to an issue other than character; (2) necessary; and (3) reliable.'" Siegel, 536 F.3d at 317.

1. Non-character Purpose

The government has made no suggestion that it plans to use the challenged evidence to prove the defendant's character. "Rule 404(b) . . . protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character." Huddleston, 485 U.S. at 687 (emphasis added). Rather, the government notified the defendant that it intended to use the evidence for permissible purposes, including proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

The permitted uses of evidence under Rule 404(b) largely overlap. For instance, if the government can show that a defendant engaged in a particular or specific modus operandi ("M.O."), the permitted use of the M.O. evidence comes from linking the defendant to matters of identity, knowledge, plan, preparation, intent, lack of accident, etc.¹ When "other crime" evidence is shown to establish an M.O., it is admissible under Rule 404(b). Siegel, 536 F.3d at 318. In fact, the Fourth Circuit has recognized that "the more similar the prior act is (in terms of physical similarity or

¹ For example, in the popular 1990 film, "Home Alone," Marv, a bungling burglar, established an M.O. by leaving faucets running in his victims' houses to cause flooding. As he was being arrested at the end of the film, one police officer quips, "Nice move. Always leaving the water running? Now we know each and every house you've hit." Proud of having established his calling card, Marv confirms his association with "The Wet Bandits."

<https://www.youtube.com/watch?v=QhaICfThNGw> (last visited June 27, 2025).

mental state) to the act being proved, the more relevant it becomes." Queen, 132 F.3d at 997 (emphasis added).

Should the Court determine that the other PPP loans are "other bad acts" such that Rule 404(b) is implicated, the government submits that because the other acts were carried out in exactly the same way and over the same period of time, those acts establish M.O. evidence, which satisfies Rule 404(b)'s requirements. See Huddleston, 485 U.S. at 689 ("In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.").

2. Necessary Evidence

Additionally, the evidence is necessary for the government's case. If the government is limited to showing the jury only the interactions between defendant Sutton and defendant Wright, the jury would be kept away from compelling and consistent evidence demonstrating that what occurred as between defendants Sutton and Wright was no accident, no case of mistaken identity, etc. The M.O. was the same, and each fraudulent loan had at least one person in common: defendant Sutton.

A district court's "discretion must be balanced by the need to give the government adequate latitude to prove its case." Bajoghli, 785 F.3d 964. "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue,

especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." Huddleston, 485 U.S. at 685.

3. Reliable

The proposed evidence is also reliable. Much of it is self-authenticating business record evidence from such sources as banks, internet service providers, mortgage lenders, and financial technology companies. Additionally, anticipated witness testimony is expected to be consistent with statements made in Stipulations of Fact and statements made while under oath at plea hearings before the Court.

The government's proposed evidence is relevant to issues not related to the defendant's character, the evidence is necessary, and the evidence is reliable. Siegel, 536 F.3d at 317. Accordingly, the government has satisfied Rule 404(b)'s requirements, as interpreted by the Fourth Circuit.

4. Rule 403

"Evidence sought to be admitted under Rule 404(b) must also satisfy Rule 403's requirement." Siegel, 536 F.3d at 319. "Under this rule, 'damage to a defendant's case is not a basis for excluding probative evidence,' because 'evidence that is highly probative invariably will be prejudicial to the defense.'" Basham,

561 F.3d at 326 (quoting Grimmond, 137 F.3d at 833) (emphasis added).

The government's proposed evidence would neither mislead the jury nor confuse the issues. The evidence is a critical part of the government's case to prove, beyond a reasonable doubt, that the defendant knowingly executed a bank fraud scheme as charged. "Once it is recognized that evidence is probative of an element of the crime charged, 'the balance under Rule 403 should be struck in favor of admissibility, and evidence should be excluded only sparingly.'" Bajoghli, 785 F.3d at 966 (quoting United States v. Aramony, 88 F.3d 1369, 1378 (4th Cir. 1996)) (emphasis added).

In Bajoghli, the Fourth Circuit reversed the district court's exclusion of evidence under Rule 403 because the lower court's ruling reflected "a misunderstanding of what constitutes unfair prejudice under Rule 403." 785 F.3d at 966 (emphasis in original). The Court declared that "unfair prejudice 'speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.'" Id. at 966 (quoting Basham, 561 F.3d at 327) (emphasis in original).

The government's proposed evidence would not "lure" the jury into convicting the defendant on some ground different from what the proof elements of the charged offenses are. As such, the

government's evidence is not "unfair;" but the government recognizes it would damage the defendant's case. So be it. Basham, 561 F.3d at 326 (stating that damage to a defendant's case is not a basis for excluding probative evidence).²

The probative value of the proposed evidence significantly outweighs any unfair prejudice that might result. But more specifically, the government submits that the use of the proposed evidence would not be unfair and would not confuse or mislead the jury. Rather, the evidence completes the whole story about what the defendant did.

C. The government has provided sufficient notice of its intended use of any Rule 404(b) evidence.

The government is required to give advanced notice of its intended use of Rule 404(b) evidence. Fed. R. Evid. 404(b)(3). Specifically, the government is required to "(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; (B) articulate in the notice the permitted purpose for

² Of note, the defendant provides no reasoning for her Rule 403 challenge to the government's proposed evidence. In fact, her entire Rule 403 argument is contained in just one sentence: "Ms. Sutton challenges the proposed 404(b) evidence as being irrelevant, non-probative to any issue in the case, or its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." ECF No. 263 at 7. The defendant's blanket, one sentence Rule 403 challenge contained in an 8-page filing should not be taken seriously.

which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and (C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice." Fed. R. Evid. 404(b)(3).

The government has complied with the rule. The defendant cites to the Fourth Circuit case of United States v. Hall, 885 F.3d 254 (4th Cir. 2017), for the proposition that the government must identify each proper purpose for its evidence and specifically fit the evidence into a chain of inferences that it puts into a written notice. ECF No. 263 at 3. But such a detailed, inference-based approach is not appropriate when the proposed Rule 404(b) evidence is directly tied in time, place, and manner to the charged conduct.

In United States v. Bell, police executed a "no-knock" warrant at a house in Maryland. 901 F.3d 455 (4th Cir. 2018). "In the basement, where Bell was found, officers found approximately 112 grams of heroin and various drug-trafficking paraphernalia, including a digital scale, empty pill capsules, a capsule-filling device, and bottles of cutting agents." Id. at 460. Officers "also found a loaded rifle magazine that was compatible with the Mini-14 Ruger rifle. In the master bedroom upstairs, the officers found in a nightstand several more grams of heroin, another scale, approximately \$2,000 in cash, a letter addressed to Bell, and Bell's driver's license." Id. at 460.

Four months later, Bell was arrested in Washington, D.C. Officers found Bell with a loaded Glock pistol, as well as approximately \$1,000 in cash in a vehicle he had been sitting in. Id. at 460. Officers also found several small baggies of marijuana, heroin, and crack cocaine in the car's center console. Id. at 460.

In Bell's trial for the offenses discovered during the execution of the search warrant, the district court permitted the introduction of the Washington arrest as Rule 404(b) evidence. The Fourth Circuit affirmed the trial court's ruling and distinguished the case from Hall, 885 F.3d 254.

The Fourth Circuit noted in Bell that the proposed evidence against Hall was much different:

The prior convictions, however, all predated the offenses in Hall's indictment by at least five years, and the government provided only the date and statutory citation of each conviction without offering any other information regarding the circumstances giving rise to the convictions. We held that the district court had abused its discretion because the defendant's criminal history was either irrelevant to the purpose for which it had been admitted or, for certain purposes, so marginally relevant and unduly prejudicial as to violate Rule 403. Our holding in Hall, however, is far afield, as the evidence admitted there was the bare fact of the defendant's convictions from more than a half-decade before. In this case, by contrast, the evidence at issue is the defendant's own conduct and statements, which had a close factual and temporal nexus to the crimes charged in the indictment. Bell's reliance on Hall is thus unavailing.

Id. at 466 (quotations and citations omitted) (emphasis added).

Here, the defendant's case is likewise distinguishable from Hall. The government's proposed evidence is not some distant, unrelated set of transactions. The evidence is close in time, place, and manner to what is charged. And the evidence is, itself, evidence that the defendant is the individual who engaged in the charged crimes at hand, as opposed to some theoretical family member or friend who was sitting at the defendant's computer filling out defendant's Wright's PPP application.

The Court should conclude that the government has provided sufficient notice under Rule 404(b). But even if the government's notice was somehow inadequate, the Court should rule that the filing of this response more than satisfies the pre-trial notice requirements.

III. CONCLUSION

For the reasons stated herein, the government respectfully requests that the defendant's motion (ECF No. 263) be denied because the proposed evidence is intrinsic to the charged offenses, rendering Rule 404(b) inapplicable. Even if Rule 404(b) is implicated, the government respectfully submits that it has complied with the notice requirements under the rule and has satisfied the rule's permitted use standards. Accordingly, the

Court should deny the defendant's motion (ECF No. 263) challenging the government's use of proper Rule 404(b) evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing "GOVERNMENT'S RESPONSE TO DEFENDANT KISHA SUTTON'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS PURSUANT TO RULES 403 AND 404(b) OF THE FEDERAL RULES OF EVIDENCE" has been electronically filed and service has been made on opposing counsel by virtue of electronic mail this the 28th day of June, 2025, to:

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